The Sixth Circuit Court of Appeals then denied Petitioners petition for rehearing on March 15, 2005 (Petitioners Appendix 47a-48a) Petitioners request for extension of time for filing a petition for writ of Certiorari was extended by Justice Stevens as Circuit Justice until July 13, 2005.

COUNTER STATEMENT OF THE CASE

This action was commenced in the Shiawassee County Circuit Court for the State of Michigan on June 22, 2002. The cause of action filed contains alleged violations of the Michigan Elliot Larsen Civil Rights act being MCL § 37.2101 *et. seq*. On or about July 19th 2002 the Petitioners filed an answer to the complaint and a Joint Removal to the U.S. District Court for the Eastern District of the Michigan in Detroit. Respondent thereafter filed a motion for remand back to state court for lack of subject matter jurisdiction. The U.S. District Court denied the motion in an Order dated October 4, 2002.

Thereafter the Petitioners filed a motion for summary judgement alleging, (1) the Michigan Elliot-Larson Civil Rights Act does not apply to individuals, (2) Plaintiff-Appellant's complaint fails to state a claim, that the US District Court lacks subject matter jurisdiction as a result of complete preemption by the RLA and the implementing regulations for the Federal Railroad Safety Act at (49CFR § 219.1 *et. seq*.), (3) The Michigan Elliot-Larson Civil Rights Acts prohibition against requesting, making or maintaining a record of a misdemeanor arrest that does not result in a conviction applies only to prospective employees.

On November 21, 2002 U.S. District Court Judge Nancy Edmonds granted Petitioner's motion on the basis of complete preemption and made no ruling on the other claims for summary judgment.

i. Statutory Background

The relief Roddy requested included compensatory damages, exemplary damages, attorney fees and injunctive relief as provided for under the provisions of the "act". The Elliot Larson civil rights act provides:

MCL § 37.2101 Short title. [M.S.A. 3.548(101)]

Sec. 101. This act shall be known and may be cited as the Elliott-Larsen civil rights act"...

MCL § 37.2102 Recognition and declaration of civil right; action arising out of discrimination based on sex or familial status. [M.S.A. 3.548(102)]

Sec. 102. (1) The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right...

ARTICLE 2

MCL § 37.2201 Definitions. [M.S.A. 3.548(201)]

Sec. 201. As used in this article:

(a) "Employer" means a person who has 1 or more employees, and includes an agent of that person...

MCL § 37.2205a Employer, employment agency, or labor organization; record of information regarding misdemeanor arrest, detention, or

disposition; failure to recite or acknowledge information; "law enforcement agency" defined.

Sec. 205a. (1) An employer, employment agency, or labor organization, other than a law enforcement agency of this state or a political subdivision of this state, shall not in connection with an application for employment or membership, or in connection with the terms, conditions, or privileges of employment or membership request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result. A person is not guilty of perjury or otherwise for giving a false statement by failing to recite or acknowledge information the person has a civil right to withhold by this section. This section does not apply to information relative to a felony charge before conviction or dismissal...

ARTICLE 7

MCL § 37.2701 Prohibited conduct. [M.S.A. 3.548(701)]

Sec. 701. Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

(b) Aid, abet, incite, compel, or coerce a person to engage in a violation of this act.

(c) Attempt directly or indirectly to commit an act prohibited by this act.

(d) Willfully interfere with the performance of a duty or the exercise of a power by the commission or 1 of its members or authorized representatives.

(e) Willfully obstruct or prevent a person from complying with this act or an order issued or rule promulgated under this act.

(f) Coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act...

ARTICLE 8

MCL § 37.2801 Action for injunctive relief or damages; venue; "damages" defined. [M.S.A. 3.548(801)]

Sec. 801. (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both.

(2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business.

(3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees...

MCL § 37.2802 Costs of litigation. [M.S.A. 3.548(802)]

Sec. 802. A court, in rendering a judgment in an action brought pursuant to this article, may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate...

MCL § 37.2803 Legal or equitable remedies. [M.S.A. 3.548(803)]

Sec. 803. This act shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of the state... (*Emphasis supplied*)

Petitioners removed the action to federal court re-characterizing it as a federal claim on the basis of federal question jurisdiction citing complete preemption by the Rail Labor Act ("RLA") as the basis. The District Court denied Roddy's motion for remand and granted GTW's motion for summary judgment on the basis of preemption. Roddy appealed both of these rulings to the U.S. Sixth Circuit Court of Appeals.

ii. Counter Statement of Facts

Taken from the U.S. Six Circuit's Statement of Facts

"Roddy alleged in his complaint that he began his employment for Grand Trunk in 1965 as a brakeman. In 2000 Roddy was employed by Grand Trunk as a conductor. On July 11, 2000, while driving a motor

vehicle on personal business, Roddy was subjected to a routine traffic stop by the City of Durand, Michigan, Police Department. He was arrested and jailed on misdemeanor charges including possession of marijuana. Roddy's wife notified Grand Trunk that Roddy was unavailable for work on the night of July 11, 2000.

Roddy alleged in his complaint that the individual defendants, who are employees and/or agents of Grand Trunk, requested, made or maintained a record of information regarding Roddy's misdemeanor arrest or detention. Based upon those records Grand Trunk conducted a formal company investigation on a charge of possession of marijuana and ultimately terminated Roddy's employment. The misdemeanor charges that had been filed against Roddy on July 11, 2000 were eventually dismissed and no conviction resulted. Roddy commenced this action in the Circuit Court for the County of Shiawassee, State of Michigan, alleging that Grand Trunk's conduct in requesting, making or maintaining a record of the misdemeanor arrest where a conviction did not result, and their conduct in threatening, coercing, and/or ordering Roddy to release information regarding the misdemeanor arrest or face further disciplinary action violated Roddy's rights under the Michigan Elliott Larsen Civil Rights Act, MCL § 37.2205a. The relief Roddy requested included compensatory damages, exemplary damages, attorney fees and injunctive relief. Defendants removed the action to federal court on the basis of federal question jurisdiction. The district court denied Roddy's motion for remand and granted Defendant's (GTW's) motion for summary judgment. Roddy appealed both of these rulings.

The Sixth Circuit reasoned;

> "That the longstanding rule that "Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citing 28 U.S.C. § 1441(a)). "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim. "*Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6 (2003).
>
> Federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In determining whether a complaint arises under federal law we apply the "well-pleaded complaint" rule. *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 514 (6th Cir. 2003). Under this rule "we examine the 'well pleaded' allegations of the complaint and ignore potential defenses." *Beneficial Nat. Bank*, 539 U.S. at 6. "[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U.S. at 392. The well-pleaded complaint rule recognizes that the plaintiff is the master of his complaint. *Loftis*, 342 F.3d at 515. Accordingly, if the plaintiff chooses to bring a state law claim, that claim cannot generally be "recharacterized" as a federal claim for the purpose of removal. *Id.* (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)). It is settled law that "a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the

federal defense is the only question truly at issue." *Caterpillar*, 482 U.S. at 393 (emphasis in original). *See also Beneficial Nat. Bank*, 539 U.S. at 6 ("[A] defense that relies on the pre-emptive effect of a federal statute will not provide a basis for removal."); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987) ("Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court.").

Complete Preemption;

The U.S. Sixth Circuit agreeing with the Third Circuit;

The Third Circuit similarly found "no evidence in the RLA or its legislative history of a Congressional intent to permit recharacterization and removal of what purports to be a state claim." *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3d Cir. 1988)."...

The U.S. Sixth Circuit agreeing with the Eleventh Circuit;

"The Eleventh Circuit examined the RLA in *Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349 (11th Cir. 2003). Based upon the language and substance of the RLA and its legislative history, the Eleventh Circuit concluded that the RLA did not have the extraordinary preemptive force necessary to create federal removal jurisdiction. *Id.* at 1357. The court noted that in contrast to the LMRA and ERISA, the RLA does not create a federal cause of action for the resolution of disputes. *Id.* at 1354. Accordingly, federal courts are not in a position to fashion a cohesive body of federal

law for enforcement of collective bargaining agreements under the RLA. *Id.* Moreover, there is no indication that Congress intended for federal courts to acquire jurisdiction solely to ensure that minor disputes are redirected from the courts to the boards of adjustment. *Id.* ... On review we conclude that the Eleventh Circuit's analysis of the RLA in *Geddes*, 321 F.3d at 1353- 57, is most consistent with the Supreme Court's instructions on how to approach issues of complete preemption. Complete preemption represents a substantial departure from the firmly established well- pleaded complaint rule. This Court is hesitant to find such a departure absent clear Congressional intent to that effect. We agree with the Eleventh Circuit that Congress has not clearly manifested an intent to make all causes of action that touch on railroad employment removable to federal court."... Grand Trunk has suggested in the alternative that the district court's finding of complete preemption finds support in the Railroad Administration Regulations at 49CFR § 219.1 *et seq.* In *AmSouth Bank v. Dale*, 386F.3d 763,776 (6th Cir. 2004) we rejected the contention that a federal regulation could completely preempt state law claims. We noted that although an agency has the ability to promulgate regulations with the force of federal law and therefore has the ability to preempt state causes of action through ordinary preemption, it does not have the ability to create a right of action where Congress has not intended it do so. 386 F.3d at 776-77. "While the agency can create federal law, it cannot expand federal jurisdiction." *Id.* at 777. We conclude that there was no removal jurisdiction in this case and that the case should be remanded to state court. Because there is no removal jurisdiction, we do not have jurisdiction to reach the question of whether

> Roddy's state claim is in fact preempted by federal law (complete citation added)... We agree with the Third and Eleventh Circuits that "[s]tate courts are competent to determine whether state law has been preempted by federal law and they must be permitted to perform that function in cases brought before them, absent a Congressional intent to the contrary." *Geddes,* 321 F.3d at 1357 (quoting *Ry. Labor Execs. Ass 'n*, 858 F.2d at 942). *See also Price*, 829 F.2d at 876 ("We express no opinion on the merits of PSA's federal preemption defense. We have confidence in the ability and willingness of state courts to enforce federal defenses.").

The Sixth Circuit Finally agreeing with this Court in;

> "*Hawaiian Airlines v.Norris*, 512 U.S. 246, L. Ed. 2d 247 (1994) (complete citaion added) (emphasis in original). We conclude that the RLA does not have the extraordinary preemptive force necessary to create federal removal jurisdiction." (Petitioner's Appendix A at page 1a) Here the Defendants' have attempted to claim "artful pleading" by Plaintiff to avoid a federal question. The "artful pleading" doctrine allows removal where federal law completely preempts a plaintiff's state law claim. *See Metro. Life Ins. Co. v. Taylor*, 481 U.S. at 65-66"...

The issue becomes does federal law completely preclude plaintiff's state civil rights claim?

Hawaiian Airlines. v. Norris, at pages 255-256 provides some light for this court.

> "Significantly, the adjustment boards charged with administration of the minor-dispute provisions have

understood these provisions as pertaining only to disputes invoking contract-based rights. See, e.g., NRAB Fourth Div. Award No. 4548 (1987) (function of the National Rail Adjustment Board is to decide disputes in accordance with the controlling CBA); NRAB Third Div. Award No. 24348 (1983) (issues not related to the interpretation or application of contracts are outside the Board's authority); NRAB Third Div. Award No. 19790 (1973) (-this Board lacks jurisdiction to enforce rights created by State or Federal Statutes and is limited to questions arising out of interpretations and application of Railway Labor Agreement-); Northwest Airlines/Airline Pilots Assn., Int'l System Bd. of Adjustment, Decision of June 28, 1972, p. 13 (both the traditional role of the arbitrator and admonitions of the courts require the Board to refrain from attempting to construe any of the provisions of the [RLA]-); United Airlines, Inc., 48 LA 727, 733 (BNA) (1967) (The jurisdiction of this System Board does not extend to interpreting and applying the Civil Rights Act-)." (*Emphasis supplied*)

iii. Restatement of facts

Petitioners would have this Court believe the Federal Regulations 49CFR § 219.1 et sec. are an intricate part of the Collective Bargaining Agreement (hereinafter CBA) and that they have and affirmative duty to investigate and discipline employees for off duty activities that arguably involve these regulations. This is simply not supported by the clear reading of the regulations and this court's prior holdings. (*Skinner Infra*)

The Regulations in question provide a limited exception to the Fourth Amendment to the U.S. Constitution. (*See Skinner*

v. Railway Labor Executives' Association Infra) These regulations prohibit on the job possession of alcohol and illegal substances and use of the same on or off duty if it would cause on duty impairment. (*See* 49CFR § 219.101) The purpose of these regulations is to provide for drug and alcohol testing to determine current impairment of on duty employees. (*See* 49CFR § 219.1(a)) In this matter, no on duty use or possession was proven or alleged. Further, Petitioners never gave Roddy the test required under the regulations to determine if Roddy was in any way impaired during "covered service". (*See* 49CFR § 219.300 Mandatory reasonable suspicion testing)

> *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 613-618 (1989)... Among other things, Subpart C of the regulations requires railroads to see that blood and urine tests of covered employees are conducted following certain major train accidents or incidents, while Subpart D authorizes, but does not require, railroads to administer breath or urine tests, or both, to covered employees who violate certain safety rules... The Court of Appeals reversed, ruling, inter alia, that a requirement of particularized suspicion is essential to a finding that toxicological testing of railroad employees is reasonable under the Fourth Amendment. The court stated that such a requirement would ensure that the tests, which reveal the presence of drug metabolites that may remain in the body for weeks following ingestion, are confined to the detection of current impairment.

Held:

The Fourth Amendment is applicable to the drug and alcohol testing mandated or authorized by the FRA regulations. Pp. 613-618.

(a) The tests in question cannot be viewed as private action outside the reach of the Fourth Amendment. A railroad that complies with Subpart C does so by compulsion of sovereign authority, and therefore must be viewed as an instrument or agent of the Government. Similarly, even though Subpart D does not compel railroads to test, it cannot be concluded, in the context of this facial challenge, that such testing will be primarily the result of private initiative, since specific features of the regulations combine to establish that the Government has actively encouraged, endorsed, and participated in the testing. Specifically, since [489 U.S. 603] the regulations preempt state laws covering the same subject matter, and are intended to supersede collective bargaining and arbitration award provisions, the Government has removed all legal barriers to the testing authorized by Subpart D. Moreover, by conferring upon the FRA the right to receive biological samples and test results procured by railroads, Subpart D makes plain a strong preference for testing and a governmental desire to share the fruits of such intrusions. In addition, the regulations mandate that railroads not bargain away their Subpart D testing authority, and provide that an employee who refuses to submit to such tests must be withdrawn from covered service. Pp. 614-616."

Seems quite clear, Railroad Employers have been given a limited exception to the Fourth Amendment. They are only

authorized to test "covered employees" for current impairment from drugs and alcohol under four conditions, "Post Accident/Incident" (49CFR § 219.201), "Reasonable suspicion" (49CFR § 219.300), "Probable Cause" (49CFR § 219.301) and "Randomly" (49CFR § 219.601). This limited exception does not include an employee's off duty activities only to the extent he may test positive for current impairment when reporting for duty. The Petitioners problem here is that Respondent was arrested for possession not use.

> 49CFR § 219.5 Definitions...Possess means to have on one's person or in one's personal effects or under one's control. However, the concept of possession as used in this part does not include control by virtue of presence in the employee's personal residence or other similar location off of railroad property. *(Emphasis supplied)*

Further, Petitioners never complied with the regulations and actually performed a drug and alcohol test on the Respondent. (*See* 49CFR § 219.300 Mandatory reasonable suspicion testing) Without such a test showing current impairment Petitioners have no authority to order Respondent into the EAP program to begin with, as it is a regulatory requirement not a CBA issue. (*See* 49 CFR § 219.104) and *Skinner Supra* "the regulations preempt state laws covering the same subject matter, and are intended to supersede collective bargaining and arbitration award provisions," (*See also* 49CFR § 219.13 Preemptive effect)

iv. Restatement of proceedings and Disposition Below

GTW compared Roddy's complaint and arbitration demand to justify the recharacterization and removal of what is strictly a state law cause of action. GTW stated the following at page 9 of their Petition for Certiorari:

> "Prior to the arbitration award, Roddy also filed a complaint against GTW and the other petitioners (GTW officials) in Michigan state court, which covered much of the same ground as his RLA arbitration. Like Roddy's arbitration demand, the complaint stated that it concerned the "terms, conditions, or privileges of [Roddy's] employment." Compl. ¶91 17, 30."

This is a misleading statement See **MCL § 37.2801** and **MCL § 37.2205a** *supra;* Respondent has requested the relief provided for under the Michigan Elliott-Larsen Civil Rights Act, to wit:

> Sec. 801. (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both...(3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees.

The "Adjustment Board" simply has no power to issue injunctive relief, or attorneys fees. Further, it does not have "subject matter" jurisdiction to hear state civil rights claims. (*See* 45 U.S.C. § 153 (p) and 45 U.S.C. § 153 (q) below).

v. Respondents initial complaint fails state a "Federal Question" under the "Well Plead Complaint" doctrine.

The Respondent is aware of no sections of the RLA authorizing an action to enforce the Michigan ELLIOTT-LARSEN CIVIL RIGHTS ACT (Act 453 of 1976). The only sections of the RLA vesting this court with a Federal Question/ Subject Matter Jurisdiction over "minor disputes" are those involving enforcement of an order of the Adjustment

Board (45 U.S.C. § 153 (p) and grievances concerning the award itself (45 U.S.C.§ 153 (q) below).

> "45 U.S.C. § 153 (p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties...
>
> 45 U.S.C. § 153 (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order"...

The most recent case cited by the Sixth Circuit Court of Appeals is "*Beneficial Nat. Bank v. Anderson, Supra; (See also) Hawaiian Airlines v. Norris Supra and; Rivet v. Regions Bank*, 522 U.S. 470 (1998):

The *Rivet* case provided as follows:

> (a) Respondents invoked, in support of removal, the district courts' original federal question jurisdiction under 28 U.S.C. § 1441(b). The presence or absence of such jurisdiction is governed by the "well pleaded complaint rule," under which "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, [522 U.S. 471] Because a defense is not part of a plaintiff's properly pleaded statement of his or her claim, see, e.g., *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, removal of a case to federal court may not be predicated on the presence of a federal defense. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, (1983)

A reading of Respondent's Complaint will produce no contractual claims or remedies. (*See* App 1) Respondent seeks to enforce only the State Civil Rights Act independent of any contractual remedies. The Elliot Larson Civil Rights Act (Act) provides for a remedy that is "In addition to any other remedy provided by law". (*See* MCL § 37.2803) Respondent herein asserts that Petitioners have once again failed to state a Federal Question.

REASONS FOR DENYING THE PETITION

1. Petitioners attempt to persuade this court there is a conflict among the Circuits as to the Complete Preemption of state law by the RLA. Petitioners again attempt to characterize Respondent's complaint as a minor dispute under the RLA as they did in the U.S. District Court. This position was completely rejected by the U.S. Sixth Circuit Court of Appeals. Respondent has through the RLA dispute resolution

procedures been reinstated and received all but 90 days of the three years pay lost. (Petitioners App42a-43a)

2. Respondent seeks additional relief that includes injunctive relief provided for in the Michigan Elliot Larson Civil Rights Act otherwise unavailable from the Adjustment Board. The injunctive relief sought by Respondent is to prevent the Petitioners from further violations of the "Act" not as Petitioners allege "an injunction to prevent GTW from imposing further discipline based on Roddy's arrest" (Petition for Writ page 9)

3. Respondent also prayed Petitioners pay his attorney fees compensatory damages, exemplary damages and to destroy the documents illegally held. (Elliot Larson Civil Rights Act, *See also* 49CFR § 219.901 Subpart J Recordkeeping Requirements)

4. The RLA provides for only two functions for the Federal Courts with regard to "minor disputes", *see* 45 U.S.C. § 153 (p) and 45 USCA § 153 (q) *supra*. The U.S. District Courts provide an enforcement function under 45 U.S.C. § 153 (p) and an appellate function under 45 U.S.C. § 153 (q) only after an award by the National Railroad Adjustment Board (NRAB) is published. There is no Federal cause of action for "minor disputes" beyond this.

5. Petitioner alleges several Circuit Court decisions are in conflict with the 6th Circuit's ruling in the instant case, in order to invoke this Courts jurisdiction, further delay, impede, and cause undue expense to the proceedings. It must be remembered this action began June 22, 2002.

Seventh Circuit. In *Graf v. Elgin, Joliet & Eastern Railway*, 790 F.2d 1341 (7th Cir. 1986), *Leu v. Norfolk & W. Ry.*, 820 F.2d 825, 829 (7th Cir. 1987);

This dispute was for "a railroad worker's claim of wrongful discharge" which is a RLA Dispute, as opposed to a state Civil Rights Act as we have in the instant case.

Fourth Circuit. In *Arbogast v. CSX Corp.*, 831 F.2d 290 (unpublished table decision), reported in full at 1987 WL 38662 (4th Cir. 1987);

This case involved an unpublished opinion and a state "action seeking penalties under a West Virginia statute for failure to pay wages promptly", again the duty to pay wages flows from the CBA as opposed to a state Civil Rights Act as we have in the instant case.

Eighth Circuit. *Deford v. Soo Line R.R.*, 867 F.2d 1080 (8th Cir. 1989);

Ninth Circuit. *Grote v. Trans World Airlines, Inc.*, 905 F.2d 1307, 1310 (9th Cir. 1990); *Accord Beers v. S. Pac. Transp. Co.*, 703 F.2d 425, 427 (9th Cir. 1983), *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983);

Both Eight and Ninth Circuits basically holding that state law claims that constitute minor disputes "are completely preempted by the RLA," thus cannot be remanded to state court.

Fifth Circuit. *Anderson v. Am. Airlines, Inc.*, 2 F.3d 590, 594 (5th dr. 1993); Holding that the particular state claims asserted in Anderson did not constitute "minor disputes" and therefore were not removable.

Second Circuit. *Shafii v. British Airways, PLC*, 83 F.3d 566, 569 (2d Cir. 1996) Holding that the particular state claims asserted in Shafii did not constitute "minor disputes" and therefore were not removable.

Third Circuit. In *Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 858 F.2d 936 (3d Cir. 1988) ("P&LE"), the Third Circuit held that state law claims that constitute "minor disputes" are outside federal question jurisdiction. It reasoned that Congress had "fail[ed] to create in the RLA a civil enforcement action" in federal court, and that there was no "affirmative evidence of a Congressional intent to permit removal despite the plaintiffs exclusive reliance on state law." Id. at 942- 4312

There appears to be from Petitioners pleadings above only two real conflicts among the Circuits the Eight and Ninth Circuits holdings of Complete Preemption by the RLA.

There is or should be no Circuit Split in light of this Court's opinions subsequent to these Circuit decisions concerning "Removal Jurisdiction", "Preemption", "Complete Preemption", "Federal Question Jurisdiction" and the "Well Plead Complaint" doctrine. This Court's opinions in *Beneficial* and *Rivet* subsequent to all but the six 6th Circuit in the instant matter.

Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 6 (June 2, 2003) *Supra*;

Rivet v. Regions Bank, 522 U.S. 470 (1998) citing; *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394,397, n. 2 (1981),*Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) and *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 112 (1936) *Infra*;

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994) *Supra;*

McDonald v. City of West Branch, 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984) *Infra*

Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U. S. 1 (1983) *Supra*;

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) *Infra*;

See also Taylor v. Anderson, 234 U. S. 74 (1914);

Louisville & Nashville R. Co. v. Mottley, 211 U. S. 149, 152 (1908) *Infra*;

6. The doctrine of "Complete Preemption" should not for the first time be applied to "minor disputes" under the Rail Labor Act 45 U.S.C. § 153. To date the Supreme Court has recognized complete preemption under only three statutes:

> "§ 301 of the Labor Management Relations Act, 1947 *LMRA*, 29 U.S.C. § 185, § 502(a) of the Employee Retirement Income Security Act of 1974 *ERISA*, 29 U.S.C. § 1001 et seq., and § 30 of the *National Bank Act*, 12 U.S.C. §§ 85 & 86. *Beneficial Nat. Bank*, 539 U.S. at 6-7, 11. As we noted in *Alongi v. Ford Motor Co.*, 386 F.3d 716 (6th Cir. 2004), it is the "unusually powerful pre-emptive force of § 301" that places it in the small category of statutes that not only preempt state law but also authorize removal of actions that sought relief only under state law. *Id.* at 723-24, (quoting *Beneficial Nat. Bank*, 539 U.S. at 7). In those cases where the Supreme Court has found complete preemption, "the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial Nat. Bank*, 539 U.S. at 8. See also the *Price-Anderson Act*

> contains an unusual preemption provision, 42 U.S.C. § 2014(hh), that not only gives federal courts jurisdiction over tort actions arising out of nuclear accidents but also expressly provides for removal of such actions brought in state court even when they assert only state-law claims. *Beneficial Nat. Bank*, 539 U.S. at 6 (*citing El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484-85 (1999))". (*Emphasis supplied*) (Quoted from Petitioner's Appendix A at page 3a U.S. Sixth Circuit's opinion)

7. Respondent's original complaint does not state a "Federal Question" under the "Well Plead Complaint" doctrine. (*See* Respondents Complaint, App. 1 at 1b through 9b)

8. There is a point of agreement between the Petitioner, the Respondent and the U.S. Sixth Circuit, namely that the District Court lacks "subject matter" jurisdiction of this case. It is the Respondent's position that the complaint filed herein does not contain a "federal question" since it is not founded on a claim or right arising under the Constitution, treaties or laws of the United States. (*See* 28 U.S.C. §§ 1331 and 1441 (b)) The Petitioner in its Motion for Summary Disposition contended that the U.S District Court did not have "subject matter" Jurisdiction. Respondent agrees. "Subject matter" jurisdiction is the court's power to hear and determine cases of the general class or category to which the proceedings in question belong. "Subject matter" jurisdiction can never be waived, cannot attach by mutual consent of the parties, or through lapse of time or course of events other than provided by Constitution or Statute. The United States Supreme has addressed this issue in a 9-0 decision *Rivet v. Regions Bank*, 522 U.S. 470 (1998) decided the "well pleaded complaint

rule" governs removal and remand actions and "subject matter" jurisdiction. The *Rivet* Court stated:

> "Congress has provided for removal of cases from state court to federal court when the plaintiff's complaint alleges a claim arising under federal law. Congress has not authorized removal based on a defense or anticipated defense federal in character. This case presents the question whether removal may be predicated on a defendant's assertion that a prior federal judgment has disposed of the entire matter, and thus bars plaintiffs from later pursuing a state law-based case. We reaffirm that removal is improper in such a case. In so holding, we clarify and confine to its specific context the Court's second footnote in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397, n. 2 (1981). The defense of claim preclusion, we emphasize, is properly made in the state proceeding, subject to this Court's ultimate review. ... A state court action may be removed to federal court if it qualifies as a "civil action . . . of which the district courts of the United States have original jurisdiction," unless Congress expressly provides otherwise. 28 U.S.C. § 1441(a). In this case, respondents invoked, in support of removal, the district courts' original federal question jurisdiction over "[a]ny civil action . . . founded on a claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1441(b); see also 28 U.S.C. § 1331. We have long held that [t]he presence or absence of federal question jurisdiction is governed by the "well pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Caterpillar Inc.*

v. Williams, 482 U.S. 386, 392 (1987); see also *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). A defense is not part of a plaintiff's properly pleaded statement of his or her claim. See *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 112 (1936) ("To bring a case within the [federal question removal] statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."). Thus, a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 14 (1983)... In sum, claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b). Such a defense is properly made in the state proceedings, and the state courts' disposition of it is subject to this Court's ultimate review" *Rivet v. Regions Bank, supra. (Emphasis supplied)*

9. Utilizing the "well pleaded rule" the Plaintiff's complaint is founded entirely upon the Michigan Elliot Larson Civil Rights Act MCL § 37.2101 et. seq. To bring a case within the "federal question" removal statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the Plaintiff's claim. Plaintiff's "well pleaded" complaint does not contain an "essential element a right or immunity created by the Constitution or laws of the United States". The only claim that is a colorable claim of federal law is the Defendant's

pleaded defense of preemption. Under *Beneficial* and *Rivet* a federal defense, even if anticipated, does not allow removal from the State Court.

> "We therefore clarify today that Moitie did not create a preclusion exception to the rule, fundamental under currently governing legislation, that a defendant cannot remove on the basis of a federal defense." Rivet at page 478.

10. Thus, the preemption Petitioners raise is properly a defense to be resolved by the Michigan State Courts and ultimately if necessary the United States Supreme Court. Exactly, the procedural situation of *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 248 (1994) (*Supra*) applying the Railway Labor Act and specifically preemption of State Law causes of action.

It is beyond question that the complaint filed by Respondent in this matter is purely an action to enforce the "civil rights" conferred upon the Plaintiff by the Michigan Elliot Larson Civil Rights Act MCL § 37.2101 et. seq. The Respondent alleges that the individual Petitioners engaged in prohibited conduct. The Petitioners seek to cloak the personal wrongdoing of these individuals under the Railway Labor Act. The General purpose of the Railway Labor Act does not include the enforcement of State or Federal declared civil rights. (*See* 45 U.S.C. § 151a) In Plaintiff's case the loss of past and future earnings and benefits <u>are the measure of the damage</u> suffered by Respondent and not the subject matter of his complaint. It would be for the state Judge to decide the appropriate remedies. These issues are not properly a matter for the Federal District Court as they do not present a "Federal Question" for the Federal District Court to consider.

11. Respondent disputes whether his Michigan Elliot Larson Civil Rights Act complaint constitutes a Federal Question rightfully removed to the Federal District Court. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) the United States Supreme Court held that a Title VII race discrimination claim not foreclosed by prior submission to arbitration under collective bargaining agreement because the employee's rights under Title VII were not part of the collective bargaining process and cannot be prospectively waived. (*Emphasis supplied*)

> "We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance arbitration clause of a collective bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim de novo." *Alexander v. Gardner-Denver Co.*, at page 60-61. This rational was further explained by the United States Supreme Court in *McDonald v. City of West Branch*, 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984) The Court pointed out that because an arbitrator's expertise pertains to the law of the shop rather than the law of the land, the arbitrator may not have "the expertise required to resolve the complex legal issues presented by the civil rights statutes." *Id. at 290.* Second, because an arbitrator is authorized only to interpret the collective bargaining agreement, he has no authority to enforce the civil rights laws should the rights protected by those statutes conflict with the agreement. *Id. at 290-91.* Third, because the interests of the union and the individual employee are not always coextensive, and because the union usually

has exclusive control over presentation of the grievance, the "employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously." *Id. at 291.* Finally, the Court observed that "arbitral fact-finding is generally not equivalent to judicial fact-finding." Id. n1" (*See also McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1254-55 (10th Cir. 1988); *Ryan v. City of Shawnee*, 13 F.3d 345 (10th Cir 1993); *Salone v. United States, 645 F.2d 875* (10th Cir.), *cert. denied*, 454 U.S. 894, 70 L. Ed. 2d 208, 102 S. Ct. 390 (1981).

Since, admittedly the Adjustment Board has no jurisdiction to hear and rule upon a "Civil Rights" case and even in the face of a Board decision the federal courts have allowed "civil rights" case to continue it is not possible to say that the RLA completely preempts "civil rights" claims.

In view of the direction of the United States Supreme Court in *Rivet* this defense affords the District Court no "subject matter" jurisdiction in this cause. Even though the District Court denied the Respondent's motion to remand, once it becomes clear that it lacks federal "subject matter" jurisdiction it must remand to the state court. (*See Rivet v. Regions Bank, supra*) The issue of preemption should therefore be properly decided in state court after it has determined the validity of Respondent's state claim.

CONCLUSION

The arguments of the Petitioners do not preclude the Respondent's complaint. There is no issue of material fact that the Petitioners requested, made or maintained a record of a misdemeanor arrest that did not result in a conviction.

Respondent should be afforded his "civil rights" as expressed by the State of Michigan. Respondent's Complaint alleges acts by individuals that violate the rights created by the Michigan Elliot Larson Civil Rights act in requesting, making or maintaining a record of a misdemeanor arrest that did not result in a conviction. This is purely a factual dispute about an employer's conduct not his motives. There is no need to refer to the CBA to determine if the Petitioners violated the Michigan Elliot Larson Civil Rights Act. Subsequently, it is alleged that the Petitioners coerced the Respondent to forego his rights not to discuss this misdemeanor arrest, an expressed "civil right". Again, this is purely a factual dispute not requiring interpretation of the CBA. The Respondent's complaint alleges a state cause of action created under the Michigan Elliot Larson Civil Rights Act MCL § 37.2101 et. seq. These rights are independent of the CBA. As such under the 6 decades of Supreme Court precedents cited herein the matter is and cannot be preempted by the Railway Labor Act.

As to preemption under the Federal Regulations, the Regulations apply to "on duty" impairment use or possession and create a limited exception to the Fourth Amendment, as such they must be strictly construed. They allow only limited discretion to the carrier in the action they can undertake. (i.e. request that a "covered employee" submit to a drug or alcohol test.) *See Skinner v. Railway Labor Executives, supra*

PRAYER FOR RELIEF

WHEREFORE Respondent, James T. Roddy, preys that this Honorable Court deny Certiorari. Plaintiff further prays that this Honorable Court grant to Respondent such other affirmative relief as this Court deems just, necessary and proper.

Respectfully submitted

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APPENDIX 1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SHIAWASSEE

Case No. 02-8184

JAMES T. RODDY,
Plaintiff,

v.

GRAND TRUNK WESTERN RAILROAD INC., subsidiary of CANADIAN NATIONAL RAILWAY LTD, TRACY MILLER, LAWRENCE T. WIZAUER, DAVID CROMIE, PETER BRANDON, THOMAS WILLETT, LAWRENCE R. MARTENIS, Jointly and Severally,
Defendants.

COMPLAINT

NOW COMES Plaintiff, James T. Roddy, by and through his attorney Douglas A. McKinney and states the following cause of action against the Defendants as follows:

Jurisdiction and Parties

1. This is an action for violation of the Michigan Elliott-Larsen Civil Rights Act, MCLA 37.2101 et seq., MSA 3.548(101) et seq., (hereinafter "The Act") and the common law of the State of Michigan.

2. Plaintiff, James T. Roddy is a resident of the City of Durand, Shiawassee County, State of Michigan.

3. Defendant, Grand Trunk Western Railroad INC. (hereinafter GTW), is a Delaware corporation and is authorized to conduct business in the State of Michigan, and is doing business in the City of Durand, Shiawassee County, State of Michigan.

4. Defendant, TRACY MILLER, upon information and belief for relevant times herein was an employee and/or agent of Defendant GTW carrying out his employment at least in part in the City of Pontiac, State Michigan, further that the actions hereinafter complained of occurred at least in part in the County of Shiawassee, State of Michigan

5. Defendant, LAWRENCE T. WIZAUER, upon information and belief for relevant times herein was an employee and/or agent of Defendant GTW carrying out his employment at least in part in the City of Troy, State Michigan, further that the actions hereinafter complained of occurred at least in part in the County of Shiawassee, State of Michigan

6. Defendant, DAVID CROMIE, upon information and belief for times relevant herein was an employee and/or agent of Defendant GTW carrying out his

employment at least in part in the City of Flint, State Michigan, further that the actions hereinafter complained of occurred at least in part in the County of Shiawassee, State of Michigan

7. Defendant, PETER BRANDON, upon information and belief for relevant time herein was an employee and/or agent of Defendant GTW carrying out his employment at least in part in the City of Troy, State Michigan, further that the actions hereinafter complained of occurred at least in part in the County of Shiawassee, State of Michigan

8. Defendant, THOMAS WILLETT, upon information and belief for relevant time herein was an employee and/or agent of Defendant GTW carrying out his employment at least in part in the City of Troy, State Michigan, further that the actions hereinafter complained of occurred at least in part in the County of Shiawassee, the State of Michigan

9. The events hereinafter described, giving rise to this cause of action occurred at least in part in the City of Durand, Shiawassee County, State of Michigan.

10. The amount in controversy exceeds $25,000, exclusive of interest, costs, and attorney fees and this matter is otherwise within the jurisdiction.

Background Facts

11. Plaintiff began his employment with Defendant in 1965, as a Brakeman.

12. Over the years of his employment with Defendant, Plaintiff served in a variety of positions, including Conductor.

13. On or about the afternoon of July 11, 2000, while driving a Motor vehicle on personal business Plaintiff was subjected to a routine traffic stop by the City of Durand Police Department that led to an arrest on Misdemeanor charges including but not limited to Possession of Marijuana.

14. During the course of the arrest the Plaintiff was exposed to a chemical irritants and jailed.

15. Plaintiff's wife notified Defendant GTW, Plaintiff's employer, that Plaintiff was unavailable for work on the night of July 11, 2000.

16. Almost immediately thereafter, upon information and belief, Defendants Cromie, Miller, Wizaurer, Martenis and Willett requested, made or maintained a record of information regarding this misdemeanor arrest or detention of Plaintiff.

17. As a result of the Defendants requesting, making or maintaining of a record or information of this misdemeanor arrest and detention, Defendant, GTW, conducted a formal company investigation on a charge of possession of marijuana which were alleged to be in connection to the terms, conditions, or privileges of Plaintiff's employment

18. Thereafter Defendants attempted to coerce, intimidate, threaten, or interfere with Plaintiff's exercise or enjoyment of a right granted or protected by the

Elliott-Larsen Civil Rights Act MCL § 37.2701 et. seq.

19. Thereafter the Defendant GTW by its own actions and through the actions of their employees and/or agents terminated Plaintiff's employment.

20. When he was terminated, Plaintiff was a Conductor on Train #242/243.

21. Plaintiffs work performance and conduct was always satisfactory or above.

Cause of Action

22. Plaintiff incorporates by reference paragraphs 1 through 21.

23. At all material times, Plaintiff was an employee, and Defendant GTW was his employer, covered by and within the meaning of "The Act", MCLA § 37.2101 et seq., MSA 3.548(101) et seq.

24. MCL § 37.2205 prohibits an employer from requesting, making, or maintaining a record of information regarding a misdemeanor arrest, detention or disposition where a conviction did not result.

25. In this matter regarding the incident of July 11, 2000 the charges were dismissed and no conviction resulted.

26. MCL § 37.2710 prohibits two or more persons from conspiring or any person to engage in acts including but not limited to aiding, abetting, inciting, compelling, or coercing any person to engage in a

violation of "The Act", or to commit an act prohibited by "The Act", and coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment or rights granted or protected by "The Act".

27. Defendant, GTW's decision to terminate the Plaintiff's employment from his position of Conductor was as a direct result of the request for, and subsequent making of or maintaining of a record of information regarding a Misdemeanor arrest or detention that did not result in a conviction.

28. On or about August 4, 2000 and October 12, 2000 Defendants including Defendants Brandon and Miller threatened, coerced and/or ordered, the Plaintiff to release information regarding a Misdemeanor Arrest or Detention or face further disciplinary action in violation of MCL § 37.2205a(1).

29. Defendant, through its agents, representatives, and employees, was predisposed to discriminate against the Plaintiff on the basis of the Defendants' request, the making of, or maintaining of information regarding a misdemeanor arrest, detention and/or disposition where a conviction did not result and/or the Plaintiff's exercise of his rights under "The Act". The Defendants thereafter acted in accordance with that predisposition.

30. Defendants, through its agents, representatives, and employees, treated Plaintiff differently from similarly situated employees in the application of the terms and conditions of employment, based on requesting, making or maintaining a record of information regarding a misdemeanor arrest, detention, or

disposition where a conviction did not result, and/or the exercise of Plaintiff's right not to reveal such information under "The Act".

31. Defendants' actions were intentional and in disregard for Plaintiff's rights under "The Act" with the intent to inflict financial and emotional distress upon the Plaintiff's normal well being.

32. The Defendant GTW is responsible for its own wrongdoing and for the wrongful actions of its employees and/or agents taken within the scope of their employment.

33. As a direct and proximate result of Defendants' unlawful and wrongful actions, Plaintiff has sustained injuries and damages including, but not limited to, loss of earnings in excess of $160,000.00 and earning capacity; loss of career opportunities; humiliation and embarrassment; mental and emotional distress; and loss of the ordinary pleasures of everyday life, including the right to pursue gainful occupation of choice.

PLAINTIFF REQUESTS that this court enter judgment Defendants as follows:

1. Compensatory damages in whatever amount above $25,000 he is found to be entitled;

2. Exemplary damages in whatever amount above $25,000 he is found to be entitled;

3. An award commensurate of approximately two years lost wages and the value of fringe benefits lost,

including but not limited vacation pay, sick and personal days, past and future;

4. An award of interest, costs, and reasonable attorney fees pursuant to MCL §37.2801(3);

5. An order enjoining Defendant, its agents, representatives, and employees from further acts of discrimination or retaliation;

6. An order reinstating Plaintiff to the position he would have held if Defendant had not discriminated;

7. An order directing the Defendant Employer to remove and destroy all files, records, transcripts, notations and any mention of discipline or disciplinary action taken against Plaintiff in this matter; and

8. An order awarding whatever other equitable relief appears appropriate at the time of final judgment.

Respectfully submitted,

/s/ Douglas A. McKinney (P35430)
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JURY DEMAND

NOW COMES Plaintiff, James T. Roddy, by and through his attorney, Douglas A. McKinney and hereby demands that the above entitled matter be tried before a Jury

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 31 2005
OFFICE OF THE CLERK

(2)

No. 05-106

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD INCORPORATED; TRACEY MILLER; LAURENCE T. WIZAUER; DAVID CROMBIE; PETER BRANDON; THOMAS WILLETT; LAWRENCE R. MARTENIS, PETITIONERS

v.

JAMES T. RODDY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. Respondent Does Not Rebut Two of the Petition's Three Reasons to Grant Certiorari and Concedes the Core of the Third. 1

A. Respondent Fails to Address Petitioners' Demonstration that the Decision Below Conflicts with this Court's Precedents and Congressional Intent and is Important to Commerce and Labor Stability. 1

B. Respondent Concedes a Conflict Among the Courts of Appeals on the Important Question of Law Presented. 2

II. Respondent Fails to Rebut Petitioners' Demonstration of the Extent of the Conceded Split 3

III. Further Percolation Is Unlikely To Provide a Better Occasion for Resolving the Conflict 5

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

ALEXANDER V. GARDNER-DENVER CO., 415 U.S. 36 (1974).5

ANDERSON V. AMERICAN AIRLINES, INC., 2 F.3D 590 (5TH CIR. 1993).....3

BENEFICIAL NATIONAL BANK V. ANDERSON, 539 U.S. 1 (2003).....6, 7, 8

BHD. OF R.R. TRAINMEN V. CHICAGO RIVER & IND. R.R., 353 U.S. 30 (1957).....1

BHD. OF R.R. TRAINMEN V. HOWARD, 343 U.S. 768 (1952)....1

CALIFORNIA V. TAYLOR, 353 U.S. 553 (1957).....1

CIRCUIT CITY STORES V. ADAMS, 532 U.S. 105 (2001).....5

CONSOLIDATED RAIL CORP. V. RAILWAY LABOR EXECUTIVES' ASS'N, 491 U.S. 299 (1989).....1

DAVIS V. INT'L UNION, UAW, NO. 05-107, (FILED JULY 15, 2005) 2

DEFORD V. SOO LINE R.R., 867 F.2D 1080 (8TH CIR. 1989)....6

FRANCHISE TAX BD. V. CONSTR. LABORERS VACATION TRUST, 463 U.S. 1 (1983).....7

GEDDES V. AM. AIRLINES, INC., 321 F.3D 1349 (11TH CIR. 2003) 6

GIBBONS V. OGDEN, 22 U.S. (9 WHEAT.) 1 (1824) 5

GORE V. TRANS WORLD AIRLINES, 210 F.3D 944 (8TH CIR. 2000) 6

GRABLE & SONS METAL PRODS., INC. V. DARUE ENG'G & MFG., NO. 04-603 (DECIDED JUNE 13, 2005) 3

GRAHAM CTY. SOIL & WATER CONSERVATION DIST. V. U.S. EX REL. WILSON, NO. 04-169 (DECIDED APRIL 20, 2005) 3

HAWAIIAN AIRLINES, INC. V. NORRIS, 512 U.S. 246 (1994) .. 4

INTERNATIONAL ASS'N OF MACHINISTS V. CENTRAL AIRLINES, INC., 372 U.S. 682 (1963) 1

O'BRIEN V. CONSOL. RAIL CORP., 972 F.2D 1 (1ST CIR. 1992) 5

PITTSBURGH & LAKE ERIE RAILROAD. V. RAILWAY.LABOR EXECUTIVES' ASS'N, 491 U.S. 490 (1989) 1

RIVET V. REGIONS BANK, 522 U.S. 470 (1998) 7

ROBINSON V. NORTHWEST, INC., 2004 WL 1941277, *4 (D. MINN. AUG. 30, 2004) 6

RY. LABOR EXECS. ASS'N V. PITTSBURGH & LAKE ERIE RY., 858 F.2D 936 (3D CIR. 1988) 6, 7

SHAFII V. BRITISH AIRWAYS, PLC, 83 F.3D 566 (2D CIR. 1996) 3, 4

SPECTOR V. NORWEGIAN CRUISE LINES LTD., NO. 03-1388 (DECIDED JUNE 6, 2005) 3

WISCONSIN PUB. INTERVENOR V. MORTIER, 501 U.S. 597 (1991) 5

STATUTES

28 U.S.C. § 1447 8

29 U.S.C. §§ 481-83 5

OTHER AUTHORITIES

FEDERAL QUESTION JURISDICTION, 37 LOY. L.A. L. REV. 1443, 1489 N.250 (2004) 7

REPLY BRIEF FOR THE PETITIONERS

I. Respondent Does Not Rebut Two of the Petition's Three Reasons to Grant Certiorari and Concedes the Core of the Third.

A. Respondent Fails to Address Petitioners' Demonstration that the Decision Below Conflicts with this Court's Precedents and Congressional Intent and is Important to Commerce and Labor Stability.

Petitioners demonstrated that the Sixth Circuit's reasoning in the decision below conflicts with this Court's precedents. *See* Pet. 20-27. Respondent does not address (much less contradict) Petitioners' demonstration that the Sixth Circuit lost sight of this Court's prior rulings that "'the District Court has jurisdiction' . . . to enforce compliance with the requirements of [Section 3 of] the Railway Labor Act," *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30, 42 (1957) (quoting *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952)). *See* Pet. 21-23.[1] Respondent also fails to address Petitioners' showing that the Sixth Circuit's ruling conflicts with this Court's precedents holding that the preemptive force of the

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[1] Respondent offers no answer to *Chicago River* and *Howard*, nor to the Petition's discussion of, as further examples of federal question jurisdiction, *California v. Taylor*, 353 U.S. 553 (1957), *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989), *Pittsburgh & Lake Erie Railroad. v. Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989), and *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963). Still further examples of federal jurisdiction are discussed by amici at page 6 of their brief.

RLA[2] is no less than that of Section 301 of the LMRA, which has such "complete" preemptive force as to provide federal jurisdiction supporting removal. *See* Pet. 24-27.

Respondent also does not dispute Petitioners' demonstration (at 27-30) that the Sixth Circuit's decision is contrary to Congress's intent to make the federal courts available to enforce the RLA dispute resolution process. Nor does he deny that the question presented is important to both interstate commerce and labor stability in the air and rail industries, a point underscored by the amicus brief of three transportation organizations.

B. Respondent Concedes a Conflict Among the Courts of Appeals on the Important Question of Law Presented.

As for Petitioners' additional basis for certiorari – a six-to-three split among the circuits on the question presented, *see* Pet. 13-20 – Respondent concedes the core of Petitioners' demonstration. He acknowledges "real conflicts among the Circuits," Opp. 22, as to whether "state law claims that constitute minor disputes are completely preempted by the RLA, [and] thus cannot be remanded to state court," Opp. 21 (quotation omitted).[3]

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[2] This Reply uses the same abbreviations as in the Petition.

[3] Another petition for certiorari to the Sixth Circuit also notes this circuit split, albeit only in part (omitting discussion of the positions of the Second, Fourth, and Seventh Circuits, *see* Pet. 15-18, misattributing the Fifth Circuit's *Anderson* opinion to the Eighth Circuit, *see id.* at 17, and inaccurately reporting the position of the Ninth Circuit, *see id.* at 16-17 & n.9). *See Davis v. Int'l Union, UAW*, No. 05-107, Petition, at 23-24 (filed July 15, 2005; this Court

In light of this concession, it is of no moment that Respondent attempts to minimize the extent of the conceded conflict as only three-to-two: This Court often grants review to resolve splits where even fewer than five circuits are divided. *See, e.g., Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, No. 04-603 (decided June 13, 2005) (two-to-one split); *Spector v. Norwegian Cruise Lines Ltd.*, No. 03-1388 (decided June 6, 2005) (one-to-one split); *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, No. 04-169 (decided April 20, 2005) (two-to-one split). In any event, as we now discuss, Respondent's attempt fails.

II. Respondent Fails to Rebut Petitioners' Demonstration of the Extent of the Conceded Split.

Respondent cannot explain away the decisions of the Fifth and Second Circuits, in *Anderson v. American Airlines, Inc.*, 2 F.3d 590 (5th Cir. 1993), and *Shafii v. British Airways, PLC*, 83 F.3d 566 (2d Cir. 1996), both of which state that removal is proper when the RLA preempts a state law claim asserted in state court. *See* Pet. 17-18. Each decision has been correctly regarded by lower courts as articulating the law of the respective

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called for a response on August 18, 2005). However, notwithstanding the common theme of confusion in the courts of appeals as to the scope of the complete preemption approach, *Davis* involves different issues of statutory interpretation under a different federal statute, the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 481-483 (2004) as well as issues of appellate jurisdiction that have no parallel in this case. Accordingly, Petitioners respectfully suggest that the Court should grant certiorari in this case whether or not it does so in Davis.

circuit on the question presented, even though the courts of appeals found that the particular state claims asserted in the cases before them were not preempted by the RLA and therefore were not removable. Thus, in the decision below, the Sixth Circuit cited *Anderson* in acknowledging that "[n]ot all of the circuits are in agreement" with its determination. Pet. App. 10a-11a. And Respondent does not attempt to rebut Petitioners' demonstration that district courts within the Second Circuit have applied *Shafii* to deny remand of removed state claims that the RLA does preempt. *See* Pet. 18 n.11.

Respondent also cannot explain away the determinations of the Fourth and Seventh Circuits that the RLA provides federal jurisdiction to support removal of a minor dispute. *See* Pet. 15-16. He suggests (at Opp. 20-21) that the exact nature of the state law that the RLA is preempting will control the answer to the question presented. That suggestion is erroneous.

The issue presented by the Sixth Circuit's decision is one of federal jurisdiction, *i.e.*, whether Congress intended federal courts to have federal question jurisdiction with respect to an RLA minor dispute. How and under what state laws a plaintiff may plead a claim that constitutes a minor dispute is irrelevant to that question. The nature of the state claim may be relevant to a different analysis – whether, under *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), the dispute is in fact a minor dispute – but even then, it is the substance of the claim and its relation to the collective bargaining agreement that matters, not (as Respondent repeatedly suggests, *see* Opp. 21, 27, 28-29) its labeling as a "civil rights" claim.

It has thus been held that a state civil rights claim may indeed be preempted by the RLA. *See, e.g., O'Brien v. Consol. Rail Corp.*, 972 F.2d 1, 1 (1st Cir. 1992) (holding that a "state law providing for physical handicap discrimination claims against employers is preempted by the Railway Labor Act"). That is because, under the Supremacy Clause, "state laws that 'interfere with, or are contrary to the laws of congress, made in pursuance of the constitution' are invalid." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)).

Because federal preemption of ***state*** law is at issue, Respondent's discussion of the ***federal*** civil rights law contained in Title VII is inapposite. *See* Opp. 28-29 (discussing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)).[4] Respondent can offer no reason why it matters that the Fourth and Seventh Circuit decisions did not involve state civil rights acts. Respondent concedes that the Eighth and Ninth Circuit cases cited in the Petition (*see* Pet. 16-17) present "real conflicts among the Circuits." Opp. 22. Those cases also did not involve claims crafted as arising under state civil rights acts.

III. Further Percolation Is Unlikely To Provide a Better Occasion for Resolving the Conflict.

Petitioners demonstrated that the split in the circuits is deeply entrenched and will likely persist until

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[4] Contrary to Respondent's suggestion, federal law may subject state law discrimination claims to arbitration. *See, e.g., Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (Federal Arbitration Act requires enforcement of agreement to arbitrate non-RLA employee's state law employment discrimination claim).

resolved by this Court. *See* Pet. 19-20. Respondent's Opposition does not demonstrate otherwise.

The Opposition provides no reasoning whatsoever in support of Respondent's assertion that this Court's decision in *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), undercuts the cases on the majority side of the split. Contrary to Respondent's suggestion (Opp. 22), *Beneficial* has not been read to undermine the Eighth Circuit's majority reasoning that the RLA "'pervasively occupies' the field of railroad labor disputes, completely preempting state law claims arising out of collective bargaining agreements." *Deford v. Soo Line R.R.*, 867 F.2d 1080, 1085 (8th Cir. 1989). After *Beneficial*, *Deford* continues to be followed within the Eighth Circuit. *See, e.g., Robinson v. Northwest Airlines, Inc.*, 2004 WL 1941277, *4 (D. Minn. Aug. 30, 2004) ("[U]nder the complete preemption doctrine, the RLA preempts state law claims that require an interpretation of, or involve rights and duties created or defined by, collective bargaining agreements." (citing *Beneficial*, *Deford*, and *Gore v. Trans World Airlines*, 210 F.3d 944 (8th Cir. 2000))).

Further negating Respondent's contention, commentary has suggested that *Beneficial* undercuts the minority position barring removal, as Petitioners discussed. *See* Pet. 26 n.10. The Eleventh Circuit (which the Sixth Circuit has now followed) included as a basis of its remand determination the premise that there was "no evidence of congressional intent to make RLA claims removable," *Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349, 1354 (11th Cir. 2003), following the Third Circuit's finding that there was no "affirmative evidence of a Congressional intent to permit removal despite the plaintiff's exclusive reliance on state law,"

Ry. Labor Execs. Ass'n v. Pittsburgh & Lake Erie Ry., 858 F.2d 936, 942-43 (3d Cir. 1988). Subsequently, however, this Court in *Beneficial* reversed the Eleventh Circuit when it relied upon the same premise in a case that considered federal jurisdiction supporting removal under a different federal statute. This Court held that "the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable." *Beneficial*, 539 U.S. at 9 n.5.

Beneficial's clarifying holding has thus been siad to have raised the question whether the circuits on which Respondent and the Sixth Circuit rely "would not hold to [their] dissenting position in the future." Note, *Federal Question Jurisdiction*, 37 Loy. L.A. L. Rev. 1443, 1489 n.250 (2004) (cited in Pet. at 26 n.10).[5] Respondent cites no contrary authority or commentary.

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[5] *Beneficial* also demonstrates that Respondent's reliance on *Rivet v. Regions Bank*, 522 U.S. 470 (1998), is misplaced. *See* Opp. 24. According to *Rivet*:

> Allied as an "independent corollary" to the well-pleaded complaint rule is the further principle that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." If a court concludes that a plaintiff has "artfully pleaded" claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint. The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim.

522 U.S. at 475 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 22 (1983)). *Beneficial* thus acknowledged both the determination in *Rivet* that there is no federal question jurisdiction to determine the preclusive effect of a prior federal judgment and the existence of certain exceptions to the well-pleaded complaint rule, including when, as here, "a federal